

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL S. GALE and DEPARTMENT OF JUSTICE,
IMMIGRATION & NATURALIZATION SERVICE, San Diego, CA

*Docket No. 02-250; Submitted on the Record;
Issued June 5, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has established that he has greater than a two percent permanent impairment for loss of use of the right lower extremity, for which he received a schedule award.

On March 7, 2000 appellant, a 32-year-old border patrolman, injured his right knee while welding. He filed a claim for benefits on March 13, 2000, which the Office of Workers' Compensation Programs accepted for internal derangement of the right knee.

On April 19, 2000 Dr. Michael R. Lenihan, appellant's treating physician and a specialist in orthopedic surgery, performed surgery on appellant's right knee arthroscopy with arthroscopic repair of his lateral meniscus. Appellant returned to light duty on June 6, 2000 and returned to full duty on June 29, 2000.

In a report dated October 2, 2000, Dr. Lenihan reiterated the diagnosis of postright knee arthroscopy with lateral meniscus repair, and stated that a Biodex strength evaluation on appellant's lower extremities, performed on September 28, 2000, revealed a deficit of 15 percent in flexion, and 33 percent in extension of the right knee as compared to the left.

On December 14, 2000 appellant filed a Form CA-7 claim for a schedule award based on the partial loss of use of his right lower extremity, stemming from his accepted 2000 employment injury.

In a memorandum/impairment evaluation dated April 4, 2001, Dr. Arthur S. Harris, an Office medical adviser and Board-certified orthopedic surgeon, found based on Dr. Lenihan's October 2, 2000 report that appellant had a two percent permanent disability of the right lower extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) [the A.M.A., *Guides*]. Relying on Dr. Lenihan's statement that appellant underwent arthroscopic repair of the right lateral meniscus, the Office medical adviser accorded appellant a two percent impairment pursuant to Table 17-33, page 546, of the A.M.A.,

Guides. Dr. Harris noted that Dr. Lenihan had appellant undergo Biodex testing, which indicated residual mild weakness of knee flexion and extension, but stated that, on manual muscle examination, appellant was noted to have satisfactory symmetrical strength of all right thigh muscles.

By decision dated May 7, 2001, the Office granted appellant a schedule award for a two percent permanent impairment of the right lower extremity for the period October 2 to November 11, 2000 for a total of 5.76 weeks of compensation.

By letter dated May 23, 2001, appellant requested reconsideration. He submitted an amended October 2, 2000 report from Dr. Lenihan, in which he included an impairment evaluation and disability rating. Dr. Lenihan stated:

“Using [the A.M.A., *Guides*], [appellant] can be rated as follows. [Appellant] has objective evidence of significant decrease in strength in the right thigh on Biodex testing. This testing revealed excellent effort with a low coefficient of variants indicating a very valid test. This showed that there was a 15 percent deficit in flexion strength and a 33 percent impairment in extension strength in the right knee as compared to the left. This, in fact, somewhat understates [appellant’s] actual deficit because his left knee has had previous surgeries and is not normal either. In Biodex testing, the deficiency noted is in weakness on the right knee as compared to the left. If, in fact, [appellant’s] left knee is normal, then his actual impairment percentages would be greater. Therefore, this should be kept in mind.

“Using these percentages, there is a significant impairment in [appellant’s] flexion and extension strength of the left lower extremity. Using Table 17-8 on page 532 in [the A.M.A., *Guides*], this would correlate to a Grade IV muscle strength meaning that there is ability to move the limb against resistance and gravity but less than normal. Grade flexion impairment is a 2 percent lower extremity impairment. Grade IV extension impairment is also a 12 percent lower extremity impairment. Additionally, this test is much more accurate, objective and reliable than manual motor testing. Using the Combined Values Table on page 604, this combines to a 23 percent right lower extremity impairment.”

In a memorandum dated July 26, 2001, an Office medical adviser stated that the A.M.A., *Guides* do not discuss using Biodex testing, upon which Dr. Lenihan relied in rendering his 23 percent impairment rating, and noted that Dr. Harris had stated that under manual muscle testing, appellant’s strength was rated at a normal level. The Office medical adviser therefore recommended that the Office continue to rely on Dr. Harris’ rating of a two percent impairment based on the arthroscopy.

By decision dated July 26, 2001, the Office denied reconsideration.

The Board finds that appellant has no more than a two percent permanent impairment for loss of use of the right lower extremity, for which he received a schedule award.

The schedule award provisions of the Federal Employees' Compensation Act¹ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.² However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.

In this case, the Office determined that appellant had a two percent permanent impairment of both arms by adopting the findings of the Office medical adviser, Dr. Harris, a Board-certified orthopedic surgeon. He determined the precise impairment rating by relying on Dr. Lenihan's statement that appellant underwent arthroscopic repair of the right lateral meniscus, which translated to a two percent impairment pursuant to Table 17-33, page 546, of the A.M.A., *Guides*. Dr. Harris properly discounted Dr. Lenihan's findings of additional impairment based on decrease in strength in the right thigh, as indicated by Biodex testing. He noted that appellant had satisfactory symmetrical strength of all right thigh muscles pursuant to the manual muscle examination, which was a valid indicator of strength.

On reconsideration appellant submitted Dr. Lenihan's amended October 2, 2000 report, in which he included an impairment evaluation which accorded an additional impairment rating of 23 percent of the right lower extremity, taking into account the results of the Biodex test. The Board finds that Dr. Lenihan's report is not sufficient to negate the Office medical adviser's determination that appellant has a two percent impairment of his right lower extremity. Dr. Lenihan's opinion is of diminished probative value, as his method of measuring strength, Biodex testing, is not discussed in the A.M.A., *Guides*. As Dr. Lenihan's finding of a 23 percent impairment of the right lower extremity is not in conformance with the applicable tables and figures of the A.M.A., *Guides*, therefore, the Board finds that appellant has failed to submit sufficient medical evidence establishing a greater impairment than that awarded by the Office.

The Board finds that the Office medical adviser correctly applied the A.M.A., *Guides* in determining that appellant has no more than a two percent permanent impairment for loss of use of his right lower extremity, for which he has received a schedule award from the Office. Appellant has failed to provide sufficient medical evidence that he has greater than the two percent impairment already awarded.

¹ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

² 5 U.S.C. § 8107(c)(19).

The decisions of the Office of Workers' Compensation Programs dated July 26 and May 7, 2001 are hereby affirmed.

Dated, Washington, DC
June 5, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member